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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 537

KERSH LAKE DRAINAGE DISTRICT, _____ *Petitioner,*

v.

STATE BANK & TRUST COMPANY

WELLSTON, MISSOURI, _____ *Respondent.*

REPLY BRIEF FOR PETITIONER.

CHARLES T. COLEMAN,

BURK MANN,

RICHARD B. McCULLOCH,

SHIELDS M. GOODWIN,

Counsel for Petitioner.

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POINTS AND AUTHORITIES RELIED ON.

I

A federal court, as a court of equity, is without power to levy taxes, or to collect taxes already levied.

Thompson v. Allen County, 115 U. S. 550.

II

Act 46 of 1933 did not confer on the district court the extraordinary powers which it exercised in this case.

Normandy Beach Development Co. v. Brown-Crummer Investment Co., 5 C. C. A., 69 Fed. (2nd) 105;

Kersh Lake Drainage District v. Johnson, 309 U. S. 485, 60 Sup. Ct. 640.

III

A state statute cannot enlarge the equity jurisdiction of the federal courts, or obliterate the distinction between law and equity in such courts.

Henrietta Mills v. Rutherford County, 281 U. S. 121, 50 Sup. Ct. 270;

Matthews v. Rodgers, 284 U. S. 531, 52 Sup. Ct. 217.

IV

Collateral attack.

Rule 12 of Federal Rules of Civil Procedure, subdivision (h).

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ARGUMENT

The petition challenges the jurisdiction of the district court as a court of equity, and it also invokes the exercise of the supervisory power of this court.

The petitioner contends that a federal equity court is inherently without power to levy taxes, or to collect taxes already levied; and that a state statute cannot confer the legislative power of taxation on a federal equity court, or empower such a court to appoint receivers to administer the affairs of an improvement district for the purpose of collecting its taxes and paying its debts.

I

A federal court, as a court of equity, is without power to levy taxes, or to collect taxes already levied.

Counsel for the respondent say that the district court did not levy a tax in this case. That is a highly disputed question. But it is a wholly immaterial one, for a federal equity court is just as much without power to collect a tax already levied as it is without power to levy a tax. As said by this court:

“We see no more reason to hold that the collection of taxes already assessed is a function of a court of equity than the levy or assessment of such taxes.”

Thompson v. Allen County, 115 U. S. 550.

The brief filed by counsel for the respondent is absolutely silent about the power of a federal equity court to collect taxes. Apparently, counsel for the respondent concede that the only power of the district court in this case stemmed from Act 46 of 1933.

II

Act 46 of 1933 did not confer on the district court the extraordinary powers which it exercised in this case.

Counsel for the respondent say:

“The Arkansas court has interpreted the statute as providing the equivalent of an equitable receivership. The district court has concluded that a federal court of equity may grant relief in accordance with Act 46 of 1933.”

This is a crucial point in this case. The district court construed the act as conferring on it the full powers of an ordinary receivership for administering the affairs of the drainage district, including the collection of taxes, the allowance of claims, and the payment of debts. This was in exact accordance with the interpretation which counsel for the respondent have always put on the act. In their brief in the Supreme Court of Arkansas in *Johnosn v. Kersh Lake Drainage District*, 198 Ark. 743, the decision in which was affirmed by this court in *Kersh Lake Drainage District v. Johnson*, 309 U. S. 485, counsel for the respondent said:

“When the commissioners were made receivers of the court, the court took possession of all the assets of the district, which consisted of its assessment of benefits, and also of its record books of every kind.”

And in the same brief counsel for the respondent also said:

“The court below and this court are advised that this suit is not brought by the commissioners in their ordinary capacity, but as receivers of the United States court; and as receivers they stand on entirely different bases from that on which they would otherwise stand. As receivers of the federal court, they are not merely the commissioners of the district which are suing as such; but the suit is brought in aid of the jurisdiction of the federal court and for the purpose of collecting its judgment.”

It ought not to require argument, or the citation of authorities, to show that a state legislative act cannot confer jurisdiction on a federal equity court to take possession of all the assests of a drainage district, including its assessment of benefits, and all of its records, and to compel the

collection of drainage taxes, not in suits by the commissioners as commissioners, as the state laws require, but by them "as receivers of the United States court". And it is preposterous to contend that Act 46 of 1933 conferred such jurisdiction on any court of equity, state or federal.

The district court not only exercised all the powers of an ordinary receivership in this case, but it went far beyond an ordinary receivership, as shown by the character of the orders referred to on page 24 of petitioner's original brief.

These orders are typical of the kind of orders which the federal equity courts are making every day in improvement district receiverships in Arkansas. They have now received the approval, implied if not expressed, of the Circuit Court of Appeals in this case. This fact led Judge Johnsen to sound a note of protest in a separate opinion filed by him. Judge Johnsen said:

"I believe, however, that another note also should be struck. Under the mandatory injunction decree, which we affirmed in 92 F. 2d 783, the district court, in my opinion, could go no further than to compel the commissioners of the District to perform their statutory duties in tax collection and to make application of any properly available tax funds to the satisfaction of the previously entered judgment. The record before us indicates, however, that there have been ancillary orders entered by the district court which go beyond the scope of the power and the function which I have indicated, and it is these orders which have caused appellant to assume that the court was attempting to carry on a receivership of the District under its mandatory injunction decree, in violation of Act No. 46, Arkansas Acts of 1933 (Pope's Ark. Dig. sec. 4591), *Drainage District No. 2 v. Mercantile-Commerce Bank*

& *Trust Co.*, 8 Cir., 69 F. 2d 138, and *Dickinson v. Mingea*, 191 Ark. 946, 88 S. W. 2d 807. I think it should be specifically stated that the affirmance now made carries no approbation of any such or similar orders and no warrant for a repetition of them" (Rec. 57).

Counsel for the respondent say that the orders which Judge Johnsen characterized as "beyond the scope of the power and the function" of the district court were made with the consent of the commissioners. That is the point of the situation, and that is also its evil. The commissioners were the court's receivers, and as such they were the servants of the court. Naturally, they consented, for they could not do otherwise, to any orders which the court might make. It was not for them to question the authority and power of their judicial master. Moreover, counsel for the respondent have always held an *in terrorem* over the commissioners. In one of their briefs they said:

"If the defendants in the suit in the federal court (the commissioners) do not obey the mandatory injunction they will be imprisoned, and no state court could release them."

There was no occasion whatever for this threat, but the respondent, in furtherance of its purposeful postulate of the dominance of the federal district court over the tax proceedings in the state tribunals, suspended this Damocleian sword over the heads of the commissioners.

The result of the situation is that the landowners of the district, who have to bear the entire burden, are utterly helpless, for they are not parties to the suit, and have no right to become parties, and they cannot appeal from the court's orders, even if the orders were appealable. *Normandy Beach Development Co. v. Brown-Crummer In-*

vestment Co., 5 C. C. A., 69 Fed. (2nd) 105. As pointed out by the present court in a former case between these same parties:

“These landowners were neither served with process nor heard in either the certificate holders’ suit against the district or the mandatory injunction proceeding.”

Kersh Lake Drainage District v. Johnson, 309 U. S. 485, 60 Sup. Ct. 640.

In their brief, counsel for the respondent say:

“If in the future any order is entered which is in excess of the court’s authority, then the district can appeal.”

This is of course incorrect. Appeals cannot be prosecuted from interlocutory orders except those relating to injunctions and the appointments of receivers as specially provided in section 129 of the Judicial Code, 28 U. S. C. A., section 227.

One of the purposes of the present proceeding is to obtain an adjudication that will stay the hand of the district court within its legitimate powers. One of the reasons assigned for the allowance of the writ is as follows:

“The Circuit Court of Appeals has sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this court’s power of supervision.”

III

A state statute cannot enlarge the equity jurisdiction of the federal courts, or obliterate the distinction between law and equity in such courts.

If Act 46 of 1933 creates an equitable remedy as broad as counsel for the respondent contend it created, and as broad as it was interpreted to be by the district court, the act creates a remedy which, for that very reason, a state legislature cannot confer on a federal equity court.

This question is fully argued in the petitioner's original brief. We add excerpts, however, from two cases decided by this court which are not referred to in that brief.

"Whatever uncertainty may have arisen because of expressions which did not fully accord with the rule as thus stated, the distinction, with respect to the effect of state legislation, has come to be clearly established between substantive and remedial rights. A state statute of a mere remedial character, such as that which the petitioner invokes, cannot enlarge the right to proceed in a federal court sitting in equity, and the federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have had in a state court."

Henrietta Mills v. Rutherford County, 281 U. S. 121, 50 Sup. Ct. 270.

"The equity jurisdiction conferred on inferior courts of the United States by section 11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by section 24 of the Judicial Code (28 U. S. C. A. sec. 41), is that of the English court of chancery at the time of the separation of the two countries. *Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260; *In re Sawyer*, 124 U. S.

200, 209, 210, 8 S. Ct. 482, 31 L. Ed. 402. While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by federal courts of equity, if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies, nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the federal courts where the legal remedy is adequate."

Matthews v. Rodgers, 284 U. S. 521, 52 Sup. Ct. 217.

IV

Collateral attack.

Counsel for respondent say that the district court, by granting relief, impliedly held that it had jurisdiction, and that the subsequent motion to dismiss for want of jurisdiction of the subject matter of the suit "constitutes a collateral attack on that decree". (Respondent's brief, 7 and 8.)

If the decree of the district court had been pleaded as *res judicata* in a suit between the same parties in another court, an attack on the decree, either on a jurisdictional or on any other ground, would be a collateral attack, and the cases cited by respondent would be applicable.

But the motion to dismiss in this case was filed in the court and in the cause in which relief was granted. As the motion challenged the jurisdiction of the court, as a court of equity, over the subject matter of the suit, it was not only a direct attack, but one expressly provided for in subdivision (h) of Rule XII of the Federal Rules of Civil Procedure: "That, whenever it appears that the court

lacks jurisdiction of the subject matter, the court shall dismiss the action." The authorities hold that the question of a lack of jurisdiction of the subject matter may be raised by a party at any stage of the proceeding until it is finally decided. It can be raised on appeal though it was not raised in the trial court, and it may be raised by an appellate court, and should be raised by such court, on the court's own motion.

This question is fully argued in the petitioner's original brief, and the authorities are cited.

In the present case, the petitioner raised the question in the district court. From an adverse decision it appealed to the Circuit Court of Appeals. That court declined to pass on the question, and hence this petition. It is certainly not a collateral attack.

Respectfully submitted,

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